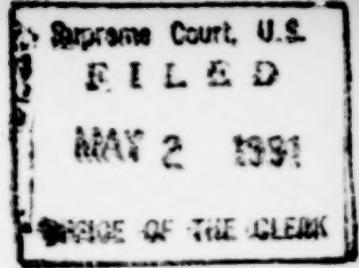


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No. 90-838



In The
Supreme Court of the United States
October Term, 1990

SHIRLEY M. MOLZOF, as personal representative
of the Estate of ROBERT E. MOLZOF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit**

BRIEF OF PETITIONER

DANIEL A. ROTTIER
Counsel of Record
VIRGINIA M. ANTOINE
HABUSH, HABUSH &
DAVIS, S.C.
217 South Hamilton Street
Suite 500
Madison, WI 53703
[608] 255-6663

THOMAS H. GEYER
KOPP, MCKICHAN, GEYER,
CLARE & SKEMP
44 East Main Street
Platteville, WI 53818
[608] 348-2615

QUESTIONS PRESENTED

1. How should the term "punitive damages," as used in 28 U.S.C. §2674, Federal Tort Claims Act, be defined?

2. Is a veteran, who is entitled to receive free medical care from the Veterans' Administration pursuant to 38 U.S.C. §610, entitled to recover damages for future medical expenses in an action under the Federal Tort Claims Act arising from the medical negligence of Veterans' Administration employees?

LIST OF PARTIES

The parties to these proceedings are petitioner Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, and respondent United States of America.

The claim of Robert E. Molzof, which is the subject of these proceedings, was originally brought by his guardian ad litem, Thomas H. Geyer. After the entry of final judgment in the United States District Court for the Western District of Wisconsin, but before the filing of the Notice of Appeal in the United States Court of Appeals for the Seventh Circuit, Robert E. Molzof died. Accordingly, Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, was substituted as plaintiff-appellant in the appellate court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Molzof v. United States*, 911 F.2d 18 (7th Cir. 1990). The opinion of the United States District Court for the Western District of Wisconsin has not been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 30, 1990. The petition for a writ of certiorari was filed on November 27, 1990. The petition was granted on March 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1346(b), United States as defendant
 28 U.S.C. §2674, Liability of the United States
 38 U.S.C. §351, Benefits for persons disabled by treatment or vocational rehabilitation
 38 U.S.C. §610, Eligibility for hospital, nursing home, and domiciliary care.

The full text of these statutes is included in the appendix to this brief.

STATEMENT OF THE CASE

I. Nature Of The Case.

This is an action under the Federal Tort Claims Act seeking recovery of damages for personal injuries sustained by Robert E. Molzof on November 2, 1986, as a result of medical negligence on the part of employees of a Veterans' Administration hospital where Mr. Molzof was a patient.

II. Statement Of Facts, Procedural History Of The Case, And Disposition In The Courts Below.

On October 31, 1986, Robert E. Molzof underwent surgery to remove a lobe of his lung at the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin. As part of his post-operative care, he was temporarily placed on a ventilator. On November 2, 1986, employees of the hospital disconnected the alarm system on his ventilator and while the alarm was disconnected, a tube providing oxygen to Mr. Molzof became disconnected. The tube disconnection was discovered eight minutes later, at which time, Mr. Molzof's heart rate was between 30 and 40 beats per minute. By the time a physician arrived, Mr. Molzof was in complete cardiac arrest. He was not resuscitated until almost a half hour later. As a result of this episode, Mr. Molzof suffered anoxic encephalopathy. (R. 38:2) In other words, he suffered irreversible brain damage due to oxygen deprivation.

As a result of the anoxic encephalopathy, Mr. Molzof was in a permanent vegetative state. He required a ventilator for assistance in breathing and a nasogastric tube for nutrition and hydration. (R. 38:4) He was in need of hospitalization for the balance of his life, and resided at the Veterans' Administration Hospital in Tomah, Wisconsin at the time of trial. (R. 38:3-4)

Mr. Molzof was a veteran who suffered from a service-connected disability and was accordingly entitled to receive free medical care from the Veterans' Administration pursuant to 38 U.S.C. §610. (R. 75:269) He had a zero percent service-connected disability rating for two conditions: flat feet and sinusitis. (R. 75:267-68)

On September 29, 1988, Robert E. Molzof and his wife, Shirley M. Molzof, commenced this action against the United States of America seeking recovery of the damages they had sustained as a result of the hospital

employees' negligence. (R. 2) The action was commenced in the United States District Court for the Western District of Wisconsin, and jurisdiction in that court was based upon 28 U.S.C. §1346(b) and on Chapter 171 of Title 28 of the United States Code.

The United States admitted that the hospital employees were negligent and that such negligence caused brain damage to Mr. Molzof. (R. 5:1; 38:2-3) Since the United States admitted liability, only the issue of damages was tried before the court, Judge John C. Shabaz, presiding. (R. 74; 75; 76) The court subsequently made oral findings of fact and conclusions of law, including the following:

Findings Of Fact

1. Based on a consideration of the testimony of three expert witnesses and a summary of Mr. Molzof's medical records, the court determined that Mr. Molzof had a life expectancy of three years at the time of trial. (R. 76:329)

2. The care received by Mr. Molzof at the Veterans' Administration Hospital in Tomah, Wisconsin was reasonable, necessary and adequate. (R. 76:330-31)

3. Shirley Molzof was satisfied with the services provided to her husband, except that she was concerned with the lack of communication between her and the medical profession, the failure to provide physical therapy to her husband, and with the fact that visits by physicians occurred once per month, rather than more often. (R. 76:331).

4. Mrs. Molzof had not shown to the satisfaction of the court that additional places of care, other than the

Veterans' Administration Hospital in Tomah, were available. Although care at one hospital in Madison, Wisconsin may have been available, Mrs. Molzof had not demonstrated that the care provided there would have been the same or similar to that provided at the Veterans' Administration Hospital. (R. 76:331-32)

5. The medical testimony most favorable to the Molzofs suggested that Mr. Molzof not be transferred to another hospital. (R. 76:332)

6. Mrs. Molzof had no intention at the time of trial to transfer her husband to another institution. (R. 76:332)

7. At the Veterans' Administration Hospital in Tomah, there was a physical therapy staffing shortage, a lack of sufficient respiratory therapists, and a lack of weekly visits by the doctor. (R. 76:332)

8. The costs of providing similar treatment to Mr. Molzof at a private institution were the following: the per diem rate was \$915 per day, annualized at \$333,975; respiratory therapy at a rate of \$50 per visit, three visits per day, annualized at \$54,750; physical therapy at a rate of \$50 per visit, one visit per week, annualized at \$2,600; occupational therapy at a rate of \$50 per visit, one visit per month, annualized at \$600; the stipulated cost of disposable equipment was \$37,388.88 per year; the stipulated cost of medication was \$12,229.13; and the stipulated cost of medical attention was \$2,340 per year. (R. 76:332-33)

Conclusions Of Law

1. Because Mr. Molzof was entitled to free medical care from the Veterans' Administration for the remainder of his life, he was not entitled to recover damages for future medical care, except for the care which was not being provided at the Veterans' Administration Hospital in Tomah. (R. 76:334-36)

2. It was not in the best interest of Mr. Molzof to move him from the Veterans' Administration facility to other hospitals, and Mrs. Molzof had no intention to have Mr. Molzof moved to another facility. (R. 76:336)

3. The care provided at the Veterans' Administration Hospital was adequate, reasonable and necessary. Mr. Molzof was entitled to continue to receive adequate, necessary and reasonable hospitalization at the level which he was receiving at the time of trial, and such hospitalization should continue throughout the rest of his life. The court concluded that in addition to the care which Mr. Molzof was receiving at the time of trial, he should receive physical therapy of one visit per week, at \$50 per visit, annualized at \$2,600; he should receive additional respiratory therapy of one visit per day, at \$50 per visit, annualized at \$18,250; and he should receive additional medical attention in the form of physician visits, in the amount of \$1,800 per year. The court concluded that such medical care was to be provided for the three-year remaining life expectancy of Mr. Molzof. (R. 76:336-37) The court did not indicate how this remedy was to be implemented.

4. The court concluded that an award greater than that provided by the court for future medical needs would be a double recovery, and would also be punitive in nature to the United States, since the government would be providing medical care through the balance of Mr. Molzof's life, but would nonetheless be required to pay damages for Mr. Molzof's future medical needs, which would not be used for that purpose. (R. 76:337-38)

5. Mr. Molzof was not entitled to recover damages for loss of enjoyment of life. Any damages for loss of enjoyment of life would not have been compensatory to him, since he was comatose. Since such damages were not compensatory, they were punitive in nature and could

not be awarded under the Federal Tort Claims Act. (R. 76:338-40)

On July 12, 1989, Judge Shabaz issued a Memorandum and Order (R. 68), which was subsequently amended by a corrected memorandum issued on August 15, 1989. (R. 77) In its memorandum, the court essentially reiterated its conclusions of law. The court determined that Mr. Molzof was entitled to future reasonable, necessary and adequate care, to include full hospitalization for the remainder of his life at a Veterans' Administration hospital, together with \$7,800 for physical therapy, \$54,750 for respiratory therapy, and \$5,400 for weekly physician's visits, for a total of \$67,950. (R. 77) The court also determined that an adequate award for loss of enjoyment of life, if such an award were permissible under the law, would be \$60,000. (R. 68:3)

On July 12, 1989, judgment was entered in favor of Mr. Molzof against the United States in the amount of \$67,950, and the government was ordered to provide Mr. Molzof with reasonable, adequate and necessary care, to include hospitalization for the remainder of his life at a Veterans' Administration facility. (R. 69).

Robert Molzof appealed from that portion of the judgment entered on July 12, 1989 in which he was denied an award for future medical expenses and denied an award for loss of enjoyment of life.

On August 30, 1990, the United States Court of Appeals for the Seventh Circuit issued its decision. The appellate court held that Mr. Molzof was not entitled to recover damages for future medical care in an amount in excess of the \$67,950 (erroneously stated by the appellate court to be \$75,750) awarded by the district court. The appellate court reasoned that since Mr. Molzof was entitled to receive free medical care from the Veterans'

Administration and since there was no evidence indicating that he was not going to receive such free care, any greater award for future medical expenses would be duplicative and punitive and hence barred by the Federal Tort Claims Act prohibition of "punitive damages" set forth in 28 U.S.C. §2674. 911 F.2d at 20-21. The court also held that Mr. Molzof was not entitled to recover damages for loss of enjoyment of life since Mr. Molzof, being comatose, would not be able to benefit from the money. Such damages would, therefore, not be compensatory, but would be punitive in nature and were thus barred by the Act. 911 F.2d at 21-22. Accordingly, the appellate court affirmed the judgment of the district court.

Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, filed a petition for a writ of certiorari, which was granted by this Court on March 18, 1991.

SUMMARY OF ARGUMENT

The Seventh Circuit's conclusion that damages for future medical expenses in excess of \$67,950 and damages for loss of enjoyment of life were punitive and hence barred by the prohibition of "punitive damages" in 28 U.S.C. §2674 was based upon a determination that "punitive damages" are "damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort." 911 F.2d at 20-21. This definition of "punitive damages" is contrary to the express language of 28 U.S.C. §2674; is inconsistent with the primary purpose of the Federal Tort Claims Act, which is to render the United States liable for the torts of its employees to the same extent as a private individual would be liable under state law; and results in narrowing the waiver of sovereign immunity which the Act was

intended to accomplish. Application of this definition is also inequitable and unworkable.

In barring "punitive damages," Congress only intended to prohibit awards of those damages which are based upon the culpability of the tortfeasor's conduct and are intended to act as punishment for that conduct. Congress essentially wanted to prevent the Government from being financially punished for the torts of its employees. Thus, 28 U.S.C. §2674 must be interpreted so as to permit awards against the United States of those state law damages which are intended by state law to act as compensation for injuries sustained as a result of the tort, and to preclude awards of damages which are intended to act as punishment for egregious conduct.

Robert Molzof made no claim for punitive damages in this case. His claims for future medical expenses and loss of enjoyment of life were based upon Wisconsin law which allows an injured person to receive compensation for such damages. The question of whether Mr. Molzof was entitled to recover such damages should be determined under Wisconsin law. The prohibition of "punitive damages" in 28 U.S.C. §2674 cannot act as a bar to his recovery of such state law damages.

ARGUMENT

The Federal Tort Claims Act, enacted in 1946, provides generally that the United States shall be liable for tortious conduct committed by its employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b). The Act also provides that "[t]he United States shall be liable, . . . , in the same manner and to the

same extent as a private individual under like circumstances, but shall not be liable . . . for punitive damages." 28 U.S.C. §2674. The principal question before the Court is how the term "punitive damages" is to be interpreted.

Punitive damages have long been accepted as part of traditional tort law by the state courts and federal courts, including this Court. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *Smith v. Wade*, 461 U.S. 30, 35 (1983). Recently, in *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991), the Court held that the common law method of assessing punitive damages is not *per se* violative of the Due Process Clause of the Fourteenth Amendment.

Punitive damages have traditionally been viewed as those damages which are based on the culpability of the tortfeasor's conduct and are meant to punish the tortfeasor for that conduct and to deter him and others from similar conduct in the future. Restatement (Second) of Torts §908 (1979); Prosser and Keaton, *The Law of Torts*, §2, pp. 9-10 (5th ed. 1984); 4 Harper, James and Gray, *The Law of Torts*, §25.5A (2nd ed. 1986); McCormick, *Handbook on the Law of Damages*, §77 (1935). The focus of punitive damages is on the character of the tortfeasor's conduct, not the extent of injury sustained by the claimant.

This Court's view of punitive damages is consistent with the traditional common law view. In *Day v. Woodworth*, 13 How. 363, 371 (1852), this Court observed:

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more

than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured.

In *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489, 492 (1875), the Court noted that the premise of the doctrine of punitive damages is "not that the sufferer is to be recompensed, but that the offender is to be punished."

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. at 1042, the Court noted that punitive damages are usually imposed for purposes of retribution and deterrence, and approved the traditional common law method of assessing punitive damages, whereby the jury determines the amount of a punitive damage award after considering the gravity of the wrong and the need to deter similar wrongful conduct, and the trial and appellate courts review the jury's determination to ensure that it is reasonable.

See also the cases cited in *Smith v. Wade*, 461 U.S. at 35, n. 3.

This traditional concept of punitive damages as being those damages which are intended as punishment for aggravative conduct has been applied by three circuit courts of appeal in defining what is meant by "punitive damages" as that term is used in the exception to the waiver of tort immunity set forth in 28 U.S.C. §2674. *Rufino v. United States*, 829 F.2d 354, 362 (2nd Cir. 1987); *Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978); *Manko v. United States*, 830 F.2d 831, 836 (8th Cir. 1987). This definition has also found support in the Ninth Circuit. *Shaw v. United States*, 741 F.2d 1202, 1208 (9th Cir. 1984); *Yako v. United States*, 891 F.2d 738, 747 (9th Cir. 1989).

Other courts of appeal, however, have rejected traditional tort principles in defining "punitive damages" for purposes of 28 U.S.C. §2674. Instead, they have created a federal standard for the definition of "punitive damages," and have defined the term to mean any damages in excess of the amount necessary to compensate the claimant. Applying this definition, the courts have determined that certain elements of damages, treated and labeled under state law as being compensatory, were actually punitive in nature and therefore not recoverable. *D'Ambra v. United States*, 481 F.2d 14, 16-21 (1st Cir. 1973), cert. denied, 414 U.S. 1075 (1973); *Flannery v. United States*, 718 F.2d 108, 110-11 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Hartz v. United States*, 415 F.2d 259, 264-65 (5th Cir. 1969); *Felder v. United States*, 543 F.2d 657, 667-70 (9th Cir. 1976). But see: *Reilly v. United States*, 863 F.2d 149, 164-65 (1st Cir. 1988).

In this case, the Court of Appeals for the Seventh Circuit adopted the latter view of "punitive damages." The Court stated:

Since it is well settled that the purpose of the Act is compensation, the majority of circuits define "punitive damages" under the Act as any damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort. . . . Whether or not an award carries with it the deterrent and punishing attributes typically associated with the word "punitive", to the extent that an award gives more than the actual loss suffered by the claimant it is punitive and nonrecoverable.

911 F.2d at 20-21, citing *Flannery v. United States*, 718 F.2d at 111.

Relying on this definition of "punitive damages," the court held that Mr. Molzof was not entitled to recover damages for future medical expenses in excess of the

amount awarded by the district court, or to recover damages for loss of enjoyment of life, because such damages would not result in compensating Mr. Molzof and were, therefore, punitive.

It is the position of the petitioner that the Seventh Circuit erroneously interpreted the term "punitive damages" for purposes of 28 U.S.C. §2674. The petitioner believes that in applying the prohibition against "punitive damages" in a Federal Tort Claims action, the federal courts must view punitive damages in the manner in which they are viewed under traditional common law tort principles, as damages which are designed to punish a tortfeasor for egregious conduct. If the damages which are awarded in accordance with state law in a Federal Tort Claims action are intended by that state's law to act as compensation for the claimant and are not assessed on the basis of the degree of culpability of the tortfeasor's conduct or awarded for the purpose of punishing that conduct, then those damages cannot be considered to be "punitive damages" for purposes of 28 U.S.C. §2674. This interpretation of the term "punitive damages" is consistent with the language of 28 U.S.C. §2674 and the purpose of the Tort Claims Act.

I. THE TERM "PUNITIVE DAMAGES" AS USED IN 28 U.S.C. §2674 MUST BE INTERPRETED IN ACCORDANCE WITH TRADITIONAL TORT PRINCIPLES TO MEAN THOSE DAMAGES WHICH ARE BASED ON THE CULPABILITY OF THE TORTFEASOR'S CONDUCT AND ARE INTENDED TO HAVE A DETERRENT AND PUNISHING EFFECT.

A. The Language Of 28 U.S.C. §2674 Indicates That The Type Of Damages For Which The United States Is Not To Be Held Liable Are Those Which Are Intended To Inflict Punishment.

The starting point for the analysis of 28 U.S.C. §2674 is the language of the statute itself. *Kosak v. United States*,

465 U.S. 848, 853 (1984). The language of the statute must be given its plain and ordinary meaning. *Id.* at 353; *Richards v. United States*, 369 U.S. 1, 9 (1962).

Section 2674 states that the United States "shall not be liable . . . for punitive damages." The ordinary meaning of the term "punitive" is "inflicting, awarding, or involving punishment or penalties; aiming at punishment." Webster's Third New International Dictionary (1976 ed.). Similarly, Black's Law Dictionary (5th ed. 1979) defines "punitive" as "Relating to punishment; having the character of punishment or penalty; inflicting punishment or a penalty." The term "punitive" carried the same meaning at the time 28 U.S.C. §2674 was enacted. The Oxford English Dictionary (1933 ed.) defines "punitive" as "Awarding, inflicting, or involving punishment; retributive, punitory." See also: Black's Law Dictionary (3rd ed. 1933). Thus, the express words of the statute itself indicate that in enacting the Tort Claims Act, Congress intended to preclude awards of those damages whose purpose is to punish the tortfeasor. Congress could not have used a more precise term than "punitive" to convey the idea that it was prohibiting damage awards which would punish the United States for the torts of its employees.

In other cases involving the interpretation of a section of the Tort Claims Act, this Court has held that the legislative intent was sufficiently evident from the language which Congress chose. For instance, in *United States v. Spelar*, 338 U.S. 217 (1949), the Court was concerned with the application of 28 U.S.C. §2680(k) which excludes claims "arising in a foreign country." In that case, a wrongful death occurred on an air base in Newfoundland which was leased to the United States. In holding that the claim fell within the exclusion, the Court held that the term "foreign country" meant precisely that,

and did not refer only to land which was not in the possession of the United States.

In *Richards v. United States*, 369 U.S. 1, the Court was concerned with the construction of that portion of 28 U.S.C. §1346(b) which provides that the Government's liability is to be determined "in accordance with the law of the place where the act or omission occurred." The Court held that the plain language of the statute referred to the whole law, including the choice-of-law rules, and not just the internal law, and further held that the law to which reference was made was the law of the place where the negligence occurred, and not the place where the negligence had its operative effect.

In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the Court read 28 U.S.C. §2674 in accordance with its plain language to impose liability on the United States "in the same manner and to the same extent as a private individual under like circumstances" (emphasis supplied), and not under the same circumstances, as argued by the Government.

See also: *United States v. Smith*, ___ U.S. ___, 111 S.Ct. 1180, 1188 (1991) ("any employee of the Government" as used in 28 U.S.C. §2679(b)(1) means any employee).

Similarly, the term "punitive damages" must be interpreted in accordance with its plain meaning to refer to damages which are intended to inflict punishment.

B. In Construing 28 U.S.C. §2674, It Must Be Assumed That When Congress Enacted The Tort Claims Act, It Was Aware Of The Established Tort Definition Of Punitive Damages.

Not only must the term "punitive damages" be construed in accordance with its ordinary meaning, but it must be construed in accordance with the traditional tort definition of punitive damages, because it must be

assumed that Congress had the traditional definition in mind when it enacted 28 U.S.C. §2674. Such an interpretation finds support in the reasoning of this Court in *United States v. Neustadt*, 366 U.S. 696 (1961).

In *Neustadt*, the Court was concerned with the interpretation of 28 U.S.C. §2680(h) which precludes recovery under the Tort Claims Act for "[a]ny claim arising out of . . . misrepresentation." The case involved a claim against the United States by home purchasers for damages resulting when they relied on a negligently excessive FHA appraisal and were induced by the seller to pay a price in excess of the fair market value of the home. The Court held that the claim of the home purchasers arose out of misrepresentation and hence was not actionable. In doing so, the Court, citing Restatement of Torts §552 (1938) and Prosser, *Torts* (1941 ed.), interpreted the term "misrepresentation" according to the traditional and commonly understood legal definition of the tort of "negligent misrepresentation" as would have been understood by Congress when the Tort Claims Act was enacted. 366 U.S. at 706-07. The Court stated: "Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending 'some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.'" 366 U.S. at 707-08, quoting *United States v. Spelar*, 338 U.S. at 219-20.

The same reasoning is applicable here. At the time 28 U.S.C. §2674 was enacted, punitive damages were viewed as they are today, as damages which are based on the culpability of the tortfeasor's conduct and are intended to punish him for that conduct and to deter him and others from like conduct. Restatement of Torts §908 (1939); Prosser, *Torts* §2, pp. 11-12 (1941 ed.) Congress certainly must

have been aware of this tort concept of "punitive damages" when it enacted 28 U.S.C. §2674, and must have intended that term to be interpreted in accordance with traditional tort principles, rather than in accordance with some definition created by the federal courts. Accordingly, the term must be interpreted to refer to those damages which are assessed according to the degree of culpability of the tortfeasor and are intended as punishment.

In other cases, this Court has relied on traditional tort principles in applying provisions of the Tort Claims Act. In *Williams v. United States*, 350 U.S. 857 (1955), the Court held that the question of whether a federal employee was "acting within the scope of his office or employment" under 28 U.S.C. §§1346(b) and 2671 is controlled by the state law doctrine of *respondeat superior*, and not by a federal standard.

In *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976), the Court was concerned with the question of whether an entity was a "federal agency" or a "contractor of the United States," which is excluded from the definition of "federal agency" in 28 U.S.C. §2671. The Court relied on principles of tort and agency law, which make a distinction between a servant or agent relationship and an independent contractor relationship and rest that distinction upon the authority of the principal to control the physical conduct of the contractor.

C. This Court Has Recognized That The Term "Punitive Damages" Is To Be Interpreted To Mean Those Damages Which Serve As Punishment.

On one occasion, this Court has addressed the meaning of the term "punitive" as used in 28 U.S.C. §2674. In *Massachusetts Bonding & Insurance Co. v. United States*, 352

U.S. 128 (1956), the Court was concerned with the application of the second paragraph of §2674 which provides:

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Suit was brought in that case for a death which occurred in Massachusetts. The Massachusetts Death Act imposed liability on a person causing the death of another person for damages not less than \$2,000 nor more than \$20,000 "to be assessed with reference to the degree of his culpability or of that of his agents or servants." 352 U.S. at 129. Consistent with the Massachusetts Supreme Court's interpretation of the statute as being "penal," this Court held that the statute provided for punitive damages. 352 U.S. at 129. Applying the second sentence of §2674, the Court accordingly held that the United States could only be held liable for compensatory damages. The real question was, however, whether the minimum and maximum limits contained in the Massachusetts Death Act applied to an award of compensatory damages. This Court held that the limitation did not apply. In doing so, the Court indicated that punitive damages are those which serve as punishment for a defendant's culpable conduct:

By definition, punitive damages are based upon the degree of the defendant's culpability. Where a state legislature imposes a maximum limit on such a punitive measure, it has decided that this is the highest punishment which should be imposed on a wrongdoer. This limitation, based

as it is on concepts of punishment, cannot control a recovery from which Congress has eliminated all considerations of punishment.

352 U.S. at 133.

See also *Carlson v. Green*, 446 U.S. 14, 22 (1980), where this Court equated the "punitive damages" prohibited by 28 U.S.C. §2674 with the punitive damages which are recoverable in an action under 42 U.S.C. §1983 and which are awarded to punish the tortfeasor for his outrageous conduct. *Smith v. Wade*, 461 U.S. 30.

In accordance with *Massachusetts Bonding*, the term "punitive damages" should be interpreted in this case to mean damages which are based on the degree of the tortfeasor's culpability and are assessed as punishment.

D. Interpretation Of The Term "Punitive Damages" In Accordance With Traditional Tort Principles Is Consistent With The Intent Of The Tort Claims Act.

Interpretation of the term "punitive damages" in accordance with traditional tort principles to mean those damages which are intended as punishment is supported by the plain language of §2674 and this Court's discussion in *Massachusetts Bonding*. Such an interpretation is also consistent with the purpose of the Tort Claims Act to render the United States liable to the same extent as a private individual would be.

- 1. Interpretation of the term "punitive damages" in accordance with traditional tort principles is consistent with the purpose of the Act to render the United States liable to the extent that private individuals are liable under applicable state law.**

The Federal Tort Claims Act was designed so that, with certain exceptions, the United States is rendered

liable in tort under state law principles to the same extent as a private individual would be under like circumstances. *Richards v. United States*, 369 U.S. at 6. Title 28, U.S.C. §1346(b) provides that the liability of the Government for the conduct of its employees is the same as that "under circumstances where . . . a private person . . . would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Similarly, under 28 U.S.C. §2674, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." Thus, the Act gives a prominent role to state law. Both the liability of the United States and the measure of damages to be assessed against it are to be governed by state law. In *Richards v. United States*, 369 U.S. at 6-7, this Court stated that "the Act was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States. Rather, it was designed to build upon the legal relationships formulated and characterized by the States."

If the purpose of the Tort Claims Act is to render the United States liable in tort as a private person would be liable under applicable state law, this would lead one to conclude that the components and measure of damages are to be controlled by state law. Thus, if state tort law permits an injured person to recover against a private individual for such items of damage as medical expenses, loss of earnings and earning capacity, and pain and suffering, then a person injured by the tortious acts of an employee of the United States should be able to recover for such items as well. The only limitation on the recovery of damages is that a claimant cannot recover against the United States for "punitive damages." 28 U.S.C. §2674.

In order to fulfill the purpose of the Tort Claims Act to render the Government liable as a private person would be liable under state law and to provide for a method of assessing damages which is workable in practice, the term "punitive damages" in 28 U.S.C. §2674 must be interpreted in accordance with the traditional common law concept of punitive damages. Section 2674 must be interpreted in such a manner that the claimant is allowed to recover for those elements of state law damages which are intended by state law to serve as compensation for the claimant, but is precluded from recovering any damages which are not based upon compensation, but which are awarded separately and are measured by the degree of culpability of the tortfeasor and intended to punish him for his conduct. An analysis of the definition of "punitive damages" utilized by the Seventh Circuit Court of Appeals in this case demonstrates why this is the only interpretation of §2674 which can be adopted.

The Seventh Circuit, relying on the definition adopted by the Fourth Circuit Court of Appeals in *Flannery v. United States*, 718 F.2d at 111, defined "punitive damages" for purposes of §2674 as "any damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort." 911 F.2d at 20-21. The Seventh Circuit held that regardless of whether "an award carries with it the deterrent and punishing attributes typically associated with the word 'punitive,' " an award of damages is nevertheless "punitive" if it "gives more than the actual loss suffered by the claimant." 911 F.2d at 21.

The petitioner acknowledges the fact that the purpose of the Tort Claims Act is compensation, but the question here is how the compensation is to be measured. The petitioner believes that the claimant's compensation is to be measured in accordance with what state law

views to be compensation. The claimant should be precluded from recovering only those damages which are not based on the extent of the claimant's loss, but instead are specifically awarded for the purpose of punishing the tortfeasor for his egregious conduct.

Adoption of the standard utilized by the Seventh Circuit that "punitive damages" are *any* damages in excess of the amount necessary to compensate the claimant regardless of their punishing or deterrent attributes would severely interfere with the structure of the Tort Claims Act which provides for recovery according to the law of the place where the act or omission occurred. Under the Seventh Circuit's definition of punitive damages, a federal court would be required to ignore a state's characterization of state law damages as being compensatory, and would, instead, be required to analyze each and every item of state law damage in order to determine whether the item of damage is, in fact, necessary to compensate the claimant for his loss, and then prohibit the award of any damages which are unnecessary to compensate the claimant. For instance, an award of damages for pain and suffering, which is a standard element of damages in a personal injury action, would have to be scrutinized in order to determine whether the award, or any part of it, is actually necessary to compensate the claimant. The same process would then have to be undertaken with respect to every other element of state law damages, i.e., loss of earnings, impairment of future earning capacity, past medical expenses, future medical expenses, loss of society and companionship, emotional distress. An analysis of each item of state law damage would have to be made, because it is conceivable that, if the Seventh Circuit standard were adopted, the Government could argue in every case that the method utilized by state law in measuring each damage component

results in an award which exceeds the amount actually necessary to compensate the claimant.

Moreover, if the Seventh Circuit's definition of "punitive damages" were applied literally, this would result in destroying a claimant's right to recover non-economic damages, a right which is well-recognized under state tort law. The Seventh Circuit held that "punitive damages" are "damages in excess of those necessary to compensate the victim or his survivors for the *pecuniary loss* suffered by reason of the tort." (Emphasis supplied.) 911 F.2d at 20-21. If the language used by the Seventh Circuit were applied literally, this would mean that a claimant in a Tort Claims action could not recover for non-pecuniary losses, such as pain, suffering and disability, loss of enjoyment of life, loss of society and companionship, emotional distress, and mental anguish. If Congress' overall purpose in enacting the Tort Claims Act was to render the United States liable under state tort law to the same extent as a private individual would be liable, it certainly could not have intended to preclude claimants in Tort Claims actions from recovering an entire category of damages which are well-entrenched in state tort law.

This Court has emphasized on numerous occasions that the central purpose of the Tort Claims Act is to render the Government liable in tort as a private individual would be liable under like circumstances, and that the Act should be interpreted so that this purpose is not thwarted. *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 370 (1949); *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *Indian Towing Co. v. United States*, 350 U.S. at 64, 68-69; *Rayonier Incorporated v. United States*, 352 U.S. 315, 318-19 (1957); *Richards v. United States*, 369 U.S. at 6-7, 8, 11-12; *United States v. Muniz*, 374 U.S. 150 (1963). However, interpretation of the prohibition of "punitive damages" in the manner utilized by the Seventh Circuit

would result in nullifying, with respect to damage assessment matters, the requirement of the Act that the United States is to be held liable as a private individual would be liable in accordance with the applicable state law. Non-economic damages which are a recognized part of state tort law would not be recoverable at all because they are not necessary to compensate a claimant for "pecuniary loss." Measurements of those damages which are intended by state law to compensate for economic losses would also have to be disregarded entirely, because of the possibility that such measurements would exceed the amount which federal courts would view as necessary to compensate the claimant for his pecuniary loss. In the place of state law, there would develop an entire body of federal law ascertaining and delineating what types of damages are recoverable under the Tort Claims Act as damages which compensate the claimant for his pecuniary loss and detailing how those damages are to be measured. Certainly, Congress could not have intended such a result when it prohibited awards of "punitive damages."

2. Adoption of the Seventh Circuit's definition of "punitive damages" would result in the establishment of a federal standard not warranted by the Tort Claims Act.

In interpreting the Tort Claims Act, this Court should not assume that Congress has enacted a federal standard independent of state law. *Richards v. United States*, 369 U.S. at 13. Thus, in interpreting the prohibition against "punitive damages" in §2674, the Court cannot adopt a definition of "punitive damages" which would result in nullifying the general requirement of 28 U.S.C. §§1346(b) and 2674 that damages are to be assessed in accordance with applicable state law and, instead, adopt a federal standard for measuring compensatory damages.

This Court has adopted a federal standard when such a standard is necessary to implement the Tort Claims Act. For instance, in *Feres v. United States*, 340 U.S. 135 (1950), this Court established the rule that the Government is not liable under the Tort Claims Act for injuries to servicemen under circumstances where the injuries arise out of or are in the course of activity incident to military service. Establishment of this federal rule was warranted by the distinctly federal relationship between military personnel and the Government, which relationship had always been governed by federal law. The Court reasoned that in enacting the Tort Claims Act, Congress could not have intended to disturb this relationship and depart from established federal law by subjecting the Government to suits for service-connected injuries under state law. 340 U.S. at 146.

However, the Court has been reluctant to establish other federal standards when they are not necessary to fulfill the purpose of the Tort Claims Act. For instance, in *Richards v. United States*, 369 U.S. 1, the Court refused to adopt a federal conflict of law rule in multi-state tort actions. Instead, the Court held that in subjecting the Government to liability "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. §1346(b), Congress intended a federal court to apply the whole law of the state where the tort occurred, including the conflict of law rules of that state. The Court noted that this interpretation of §1346(b) was consistent with the intent of the Act to treat the United States as a private individual would be treated under like circumstances. 369 U.S. at 11. In *Williams v. United States*, 350 U.S. 857, the Court held that the question as to whether a federal employee was "acting within the scope of his office or employment," 28 U.S.C. §§1346(b) and 2671, is not to be determined by reference to some federal standard, but,

rather, is controlled by the state doctrine of *respondeat superior*.

In this case, there is no need to adopt a federal standard for defining "punitive damages" which is different from the manner in which punitive damages are viewed under traditional tort principles. Section 2674 can simply be interpreted so that a claimant is allowed to recover for those damages which are intended by state law to act as compensation for injuries, and is precluded from recovering those damages which are based on the degree of the tortfeasor's culpability and are awarded as punishment for his conduct.

3. The Seventh Circuit's definition of "punitive damages" would result in expanding the exception in 28 U.S.C. §2674 beyond that intended by Congress.

Not only has this Court held that the Tort Claims Act is to be interpreted in a manner consistent with the policy underlying the Act, which is to hold the United States liable to the same extent as a similarly situated private individual would be liable under state law, but the Court has also held that the Act is not to be construed so as to narrow the waiver of tort immunity which Congress intended. This Court has expressed this principle in various cases. In *United States v. Aetna Casualty & Surety Co.*, 338 U.S. at 383, the Court, quoting Judge Cardozo's statement in *Anderson v. John L. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30, (1926) stated: "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced." In *Indian Towing Co. v. United States*, 350 U.S. at 69, the Court stated that "when

dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." In *Rayonier Incorporated v. United States*, 352 U.S. at 320, the Court stated: "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." Again, in *United States v. Muniz*, 374 U.S. at 165-66, the Court stated: "We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress."

Although Congress has created certain exceptions to the waiver of tort immunity, including the prohibition against awards of "punitive damages" in 28 U.S.C. §2674, the language of the exceptions is not to be construed so as to expand their applicability. See: *Block v. Neal*, 460 U.S. 289 (1983); *Berkovitz v. United States*, 486 U.S. 531 (1988); *Sheridan v. United States*, 487 U.S. 392 (1988). The same principle must be applied here.

In enacting 28 U.S.C. §§1346(b) and 2674, Congress indicated its general intention to waive the sovereign immunity of the United States and to render the United States liable in tort to the same extent as a private individual would be liable under state tort law in like circumstances. One of the exceptions to this waiver of tort immunity is the prohibition of awards for "punitive damages." However, in prohibiting awards of "punitive damages," Congress did not intend to nullify the general waiver of tort immunity. Yet, that would be the result if this Court were to adopt the Seventh Circuit's definition of "punitive damages."

Adoption of that definition would result in expanding the prohibition against "punitive damages" to an extent beyond that which Congress intended, and would result in narrowing the waiver of immunity which the Tort Claims Act was intended to accomplish. Under that definition, the Government would be immune from liability for numerous types of damages which state law views as being compensatory to a claimant and for which private individuals are held liable under state law. The Government would be immune from liability for any damages which, in the opinion of the federal courts, exceed the amount necessary to compensate the claimant, even though the intent of Congress in enacting 28 U.S.C. §2674 was merely to protect the United States from being punished for its employees' tortious conduct.

4. The Seventh Circuit's definition of "punitive damages" is unworkable in practice.

Not only would the adoption of the Seventh Circuit's definition of "punitive damages" impinge on the structure of the Tort Claims Act which provides for recovery of damages in accordance with state law, result in the establishment of a federal standard for assessment of damages to the exclusion of state standards for measuring compensatory damages, and result in narrowing the waiver of tort immunity which the Act was intended to accomplish, but the application of this definition would be difficult, if not impossible.

As indicated above, if the Seventh Circuit's definition were adopted, every element of state tort damages which are viewed under state law as being compensatory and which are not awarded as punishment for the tortfeasor's egregious conduct would have to be analyzed by the federal courts to determine whether these damages are in

fact "punitive" because they exceed the amount necessary to compensate a claimant for his pecuniary loss. The decisions of the lower federal courts in which the interpretation of the term "punitive damages" was at issue provide only a few examples of the type of damage questions which would arise if the Seventh Circuit's definition were actually attempted to be utilized in every case. In these decisions, the following questions have arisen:

Whether an award of damages for the value of the life of a decedent should be reduced by the amount of personal expenses the decedent would have incurred had he lived, *Hartz v. United States*, 415 F.2d at 264.

Whether parents of a deceased child may recover damages measured by the economic loss to the decedent's estate, *D'Ambra v. United States*, 481 F.2d 14.

Whether an award of damages for a decedent's lost income should be reduced by the amount of federal and state income taxes the decedent would have had to pay on the future earnings if he had lived, *Hartz v. United States*, 415 F.2d at 264-65; *Felder v. United States*, 543 F.2d at 665-70.

Whether an award to a widow in a wrongful death action should be reduced because the widow remarried and receives support from her new husband, *Kalavity v. United States*, 584 F.2d at 810-11.

Whether a comatose plaintiff may recover for loss of enjoyment of life, since he cannot enjoy the money and therefore cannot be compensated by it, *Flannery v. United States*, 718 F.2d at 110-11; *Rufino v. United States*, 829 F.2d at 362.

Whether a plaintiff with cognitive ability may recover damages for loss of enjoyment of life, *Burke v. United States*, 605 F.Supp. 981, 991-92 (D.Md. 1985); *Andrulonis v. United States*, 724 F.Supp. 1421, 1524-26 (N.D.N.Y. 1989).

Whether income taxes should be deducted from an award for loss of future earnings, *Hollinger v. United States*, 651 F.2d 636, 642 (9th Cir. 1981); *Flannery v. United States*, 718 F.2d at 111-12; *Manko v. United States*, 830 F.2d at 836.

Whether an award for loss of future earnings should be reduced by the amount of an award for future medical expenses, *Flannery v. United States*, 718 F.2d at 112.

Whether a brain-damaged child may recover damages for pain and suffering, *Shaw v. United States*, 741 F.2d at 1208.

Whether a brain-damaged child may recover damages for mental anguish, *Shaw v. United States*, 741 F.2d at 1208.

Whether a brain-damaged child may recover damages for destruction of his ability to enjoy life, *Shaw v. United States*, 741 F.2d at 1208.

Whether a brain-damaged child may recover for both lost earning capacity and anticipated future care. *Reilly v. United States*, 863 F.2d at 163-66.

Whether an award to a brain-damaged child for loss of earning capacity should be reduced by the amount of money he would have spent on residential care had he not been injured, *Yako v. United States*, 891 F.2d at 746-47.

Whether a severely disabled child may recover damages for lost earning capacity at all, *Anderson v. United States*, 731 F.Supp. 391, 402 (D.N.D. 1990).

Whether plaintiffs in a wrongful death action may recover damages for sorrow, mental anguish, loss of society and companionship and comfort, *Imperial v. United States*, 755 F.Supp. 695, 696-97 (N.D.W.Va. 1990).

Whether a grandparent of a severely disabled child who stands *in loco parentis* may recover for

loss of consortium, *Anderson v. United States*, 731 F.Supp. at 402.

Whether an award of future damages should be reduced to present value, *Funston v. United States*, 513 F.Supp. 1000, 1009 (M.D.Pa. 1981); *Barnes v. United States*, 685 F.2d 66, 70 (3rd Cir. 1982).

Whether an award should be reduced by the amount of collateral source benefits received by the claimant, *Smith v. United States*, 587 F.2d 1013, 1016-17 (3rd Cir. 1978); *Siverson v. United States*, 710 F.2d 557, 559-60 (9th Cir. 1983); *Aretz v. United States*, 456 F.Supp. 397, 404-08 (S.D.Ga. 1978), affirmed, 604 F.2d 417 (5th Cir. 1979); *Funston v. United States*, 513 F.Supp. at 1009-10; *Andrulonis v. United States*, 724 F.Supp. at 1524; *Anderson v. United States*, 731 F.Supp. at 400-02.

These are only a few examples of the types of questions which would arise if the Court were to adopt the Seventh Circuit's definition of "punitive damages" and the federal courts were thereby required to question and analyze the compensatory nature of any state law damage element. Moreover, if the Court were to adopt that definition, not only would the federal courts be required to analyze numerous types of state law damage elements, but the analysis of the compensatory nature of each element of damage would be a herculean task.

Kalavity v. United States, 584 F.2d 809, presents a good example of the type of analysis which the federal courts would have to make with respect to each state law damage element if this Court rejected state laws' assessment of compensatory damages and instead adopted the Seventh Circuit's definition of "punitive damages." In that case, where a woman who had remarried sought damages for the wrongful death of her first husband, the Government argued that since her remarriage entitled her to the support and companionship of her new husband, she was

not entitled to be compensated for the continuing loss of the support and affection of her dead husband. In rejecting this argument, the Sixth Circuit Court of Appeals stated:

Damages do not become "punitive" when a court refuses to consider and reduce a wrongful death award because the decedent's spouse is now living with another person who supports her financially and emotionally. It would then have to consider the stability of the present marital or living arrangement, the strength of the relationship, the health of the new husband, the likelihood of death or separation, the amount of money the new partner contributes, the value of his companionship as compared to the deceased husband's. If the survivor is not yet remarried, the court or jury would have to consider her age, appearance and personality, her desire to marry again, and her chances of finding a marriage partner. The court or jury would also have to consider whether the survivor is telling the truth or simply trying to get a larger damage award if she says she will never remarry.

584 F.2d at 811.

A similar discussion appears in *Reilly v. United States*, 863 F.2d at 165, where the First Circuit Court of Appeals indicated that if it were to apply the *Flannery* definition of "punitive damages" which was applied here by the Seventh Circuit, the court would have to engage in a difficult process of trying to ensure that every award is free of duplication and does not overcompensate. That court noted that in awarding damages for hospital expenses, a court would have to reduce the amount of the hospital bills by the value of certain items on which the claimant would not have to expend money while hospitalized, including: food, because meals would be provided by the hospital; dry cleaning, because he would spend his time in hospital gowns; and heat, light and power at his residence.

If this Court were to adopt the Seventh Circuit's standard, that "punitive damages" are those in excess of the amount necessary to compensate the claimant, the claimant would be faced with an insurmountable burden in attempting to prove each and every possible item of offset to an element of state law damage. These offsets would have to be proven in order to preclude a federal court from issuing an award which could possibly be duplicative and to thereby avert the risk that the award would be labeled as "punitive" by the Government and thus nonrecoverable.

"There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Co. v. United States*, 350 U.S. at 68. In prohibiting an award of "punitive damages," Congress could not have intended to force a claimant to prove every element of damages with such precision and accuracy so as to render an award of such damages free from the taint of duplication and overcompensation. Similarly, Congress could not have intended the federal courts to devote the enormous amount of time and resources which would be needed to verify the accuracy of the claimant's mathematical calculations.

In assessing damages in a tort action, state law generally utilizes a limited number of relatively simple rules. For example, it is generally recognized that an injured person may recover in tort for certain well-defined types of damages, including pain and suffering, loss of earnings, impairment of future earning capacity, and past and future medical expenses. These state rules usually exclude from consideration in the measurement of such damages certain facts or uncertain future events. The exclusion of these factors may sometimes result in an

award of damages which is duplicative to some extent. However, the states utilize such rules because they are easily administered and their application is uniform in each case. Certainly, Congress could not have intended that an award of damages measured in accordance with these state rules was to be labeled as "punitive" every time application of such rules resulted in an award which was somewhat duplicative. In prohibiting an award of "punitive damages," Congress merely meant to prohibit those awards of damages which were intended to punish the Government for the egregious conduct of federal employees and not to prohibit those customary damages which are awarded under traditional state tort law principles.

This Court has held that the Tort Claims Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres v. United States*, 340 U.S. at 139. The statutory section should not be read in isolation, but must be read in conjunction with the whole Act, and with due regard to the purpose and object of the Act. *Richards v. United States*, 369 U.S. at 11. The only interpretation of the prohibition against "punitive damages" in §2674 which will (1) be consistent with the language chosen by Congress, (2) give effect to the Congressional purpose underlying the Act, which is to hold the United States liable under state law principles to the same extent as a similarly situated private individual, (3) give proper scope to the waiver of tort immunity which the Act was intended to accomplish, and (4) result in an application of the prohibition which will be practical and equitable, is to permit a claimant to recover under state tort principles for those elements of damages which state law intends to act as compensation for the claimant, and to bar recovery

of any separate award of damages which are based on the degree of the culpability of the tortfeasor's conduct and intended to punish him for such conduct.

II. THE DAMAGES FOR WHICH MR. MOLZOF SOUGHT RECOVERY ARE NOT "PUNITIVE" AND ARE NOT BARRED BY 28 U.S.C. §2674.

Application of the definition of "punitive damages" as being "damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort," 911 F.2d at 20-21, led the Seventh Circuit Court of Appeals to conclude that Mr. Molzof was not entitled to recover damages for future medical expenses in excess of the amount awarded by the district court or to recover damages for loss of enjoyment of life. The court reasoned that such damages would not result in compensation to Mr. Molzof and were, therefore, "punitive." However, application of the interpretation of 28 U.S.C. §2674 advanced by the petitioner, as prohibiting only those damages which are based on the egregious nature of the tortfeasor's conduct and are intended to act as punishment for that conduct, leads to the conclusion that an award of additional damages for future medical expenses and damages for loss of enjoyment of life cannot be prohibited in this case as being "punitive."

The Molzofs made no claim that the conduct of the employees at the Veterans' Administration Hospital in Madison was willful, wanton, or egregious in any way, and did not seek recovery of damages labeled as "punitive." They merely alleged that the hospital employees were negligent in the manner in which they rendered medical care to Mr. Molzof, causing improper operation of his ventilator and resulting in permanent brain damage. (R. 2:2) They further alleged that as a result of the hospital employees' negligence, Mr. Molzof sustained

pain and suffering, the requirement of ongoing medical care, loss of enjoyment of life, and other personal injuries. (R. 2:2-3) The Molzofs made no allegation that the conduct of the employees warranted the imposition of punitive damages. The Government admitted that the hospital employees were negligent and that such negligence caused brain damage to Mr. Molzof. (R. 5:1) Since the Government admitted liability, no trial was held on the issue of negligence. The case went to trial solely on the issue of damages, and the parties agreed that the matters which were in issue included the following matters which are relevant here: (1) the sum of money which would fairly and reasonably compensate Mr. Molzof for the reasonable and necessary cost of future care which he would require as a result of the Government's negligence, (2) the life expectancy of Mr. Molzof, and (3) the sum of money which would fairly and reasonably compensate Mr. Molzof for his loss of enjoyment of life. (R. 38:8-9)

Because of the stipulation of liability and the fact that the principal damage issues were those listed above, it is obvious that the Molzofs did not attempt and could not have attempted to prove that the hospital employees' conduct was egregious. Thus, no finding was made that the conduct was egregious or warranted the imposition of punitive damages, and no award of punitive damages, in the ordinary sense of the word, was made. Applying the definition of "punitive damages" which the petitioner urges the Court to adopt, it must be concluded that this case is simply not one in which punitive damages were either sought or awarded. Therefore, under the terms of 28 U.S.C. §2674, which renders the United States liable "in the same manner and to the same extent as a private individual under like circumstances," the question of whether Mr. Molzof was entitled to recover damages for

future medical expenses or loss of enjoyment of life should be determined in accordance with Wisconsin law.

A. Robert Molzof Was Entitled To Recover Damages For Future Medical Care.

1. There was sufficient evidence establishing Robert Molzof's entitlement to recover for future medical expenses.

The general rule in Wisconsin is that a plaintiff who has been injured by the tortious conduct of another is entitled to recover the reasonable value of medical and similar services reasonably required by the injury. *Thoreson v. Milwaukee & Suburban Transport Corp.*, 56 Wis.2d 231, 243, 201 N.W.2d 745 (1972); *Sulkowski v. Schaefer*, 31 Wis.2d 600, 608, 143 N.W.2d 512 (1966). In order to recover damages for future medical costs, the plaintiff must establish that his injury requires future medical treatment and the reasonable cost of that treatment. *Bleyer v. Gross*, 19 Wis.2d 305, 309-12, 120 N.W.2d 156 (1963).

In this case, there was sufficient evidence to establish Robert Molzof's entitlement to recover for future medical care. The parties stipulated that as a result of the anoxic encephalopathy caused by the negligence of the hospital employees, Mr. Molzof would continue to need ventilator assistance in breathing for the balance of his life, that he would need to continue to receive his nutrition via a nasogastric feeding tube for the balance of his life, and that he would need hospitalization for the balance of his life. (R. 38:4) The district court found that Mr. Molzof was in need of hospitalization throughout the rest of his life. (R. 76:336) In addition, the Molzofs proved and the district court found that Mr. Molzof was in need of physical therapy, occupational therapy, respiratory therapy, and medical attention for the balance of his life. (R. 76:336-37)

Thus, there was no dispute that at the time of trial, Mr. Molzof was in need of future medical treatment.

Moreover, the Molzofs established the reasonable cost of the medical care which Mr. Molzof would require in the future. Although the district court did not award damages for future medical care, it did find that the reasonable cost of medical care had been sufficiently proven. It found that the reasonable cost of providing treatment in a private institution similar to that being provided to Mr. Molzof at the Veterans' Administration Hospital in Tomah were the following: a per diem hospital rate of \$915 per day, annualized at \$333,975; respiratory therapy at a rate of \$50 per visit, three visits per day, annualized at \$54,750; physical therapy at a rate of \$50 per visit, one visit per week, annualized at \$2,600; occupational therapy at a rate of \$50 per visit, one visit per month, annualized at \$600; disposable equipment at a stipulated cost of \$37,388.88 per year; medication at a stipulated cost of \$12,229.13 per year; and medical attention at a stipulated cost of \$2,340 per year. (R. 76:332-33) These amounts total \$443,833.01.

In sum, the Molzofs presented sufficient evidence of Mr. Molzof's entitlement to recover damages for future medical care. Since the district court found that the cost of such care amounted to \$443,833.01 per year and further found that Mr. Molzof's life expectancy at the time of trial was three years, the district court should have awarded damages for future medical care in the sum of \$1,331,649.03.

2. The fact that Robert Molzof was entitled to free medical care from the Veterans' Administration did not preclude an award for future medical care.

Under 38 U.S.C. §610, a veteran with a service-connected disability is entitled to receive free medical care

from the Veterans' Administration. Robert Molzof had a service-connected disability because he had flat feet and sinusitis. The district court determined that because Mr. Molzof was entitled to receive free medical care from the Veterans' Administration, he was not entitled to recover damages for all future medical expenses. Rather, the district court determined that he was only entitled to recover an amount which would pay for medical care necessary to supplement the care he was receiving at the Veterans' Administration hospital where he was a patient. The district court reasoned that an award of all future medical expenses would result in a double recovery and would have a punitive effect on the Government. Accordingly, the district court ordered the Government to provide Mr. Molzof with the same level of care he was receiving at the Veterans' Administration hospital, and ordered the Government to pay for additional aspects of care - physical therapy, respiratory therapy, and doctor's visits - which Mr. Molzof needed, but which were not being provided at the Veterans' Administration hospital. The Seventh Circuit Court of Appeals agreed with the reasoning of the district court, and concluded that to permit Mr. Molzof to recover an amount for future medical expenses in excess of the amount awarded by the district court would be punitive, and would violate the prohibition of "punitive damages" in 28 U.S.C. §2674. 911 F.2d at 20-21.

a. An award of future medical expenses to a veteran with a service-connected disability is not punitive.

The sole basis for the Seventh Circuit's holding that Mr. Molzof was not entitled to recover damages for future medical expenses greater than the amount awarded by the district court was its conclusion that any additional amount would be duplicative and therefore

punitive. The conclusion that any additional damages would be punitive, in turn, rested on that court's definition of "punitive damages" as being those damages in excess of the amount necessary to compensate the claimant for his pecuniary loss. Since, as argued in the previous section of this brief, such a definition of "punitive damages" is contrary to the language of 28 U.S.C. §2674 and inconsistent with the purpose of the Tort Claims Act, this definition is not a valid one. Accordingly, the Seventh Circuit's conclusion that any additional award of future medical expenses was barred by the statute is invalid as well.

As indicated above, the overall purpose of the Tort Claims Act is to hold the United States liable under state law principles to the same extent as a similarly situated private individual, and the provisions of the Act are to be applied in a manner which would accomplish this purpose. However, the Seventh Circuit's denial of an award for additional future medical expenses is directly contrary to this purpose.

It is clear under Wisconsin law that if a defendant is negligent and causes injuries to a plaintiff and those injuries require future medical care, the plaintiff is entitled to recover damages for future medical expenses. More specifically, if a patient brings an action against an admittedly negligent private hospital, the hospital is subject to liability for damages for the patient's future medical expenses. A private hospital cannot eliminate its liability for future medical expenses merely by promising to render future care to the patient, so as to eliminate the patient's right to choose the institution where he will receive care. Yet, the Seventh Circuit essentially held that the Veterans' Administration's promise to provide Mr. Molzof with future medical care under 38 U.S.C. §610 freed it from tort liability for the payment of future

medical expenses, and the court's decision resulted in forcing the claimant to seek medical care from the tortfeasor. This preferential treatment of the United States and the detrimental treatment of tort claimants is not warranted by 28 U.S.C. §2674. An award of damages for future medical expenses in this case would not be "punitive;" making such an award would only result in treating the United States like a private tortfeasor.

The Seventh Circuit's concern that an award of future medical expenses to a veteran who is entitled to receive free medical care at Veterans' Administration facilities would be duplicative and therefore "punitive" does not justify a denial of such an award. Such an award will not conclusively result in a double recovery in every case, because the claimant may not wish to receive medical care from the tortfeasor who caused his injury. In instances where the claimant would choose not to use the Government facilities, no double recovery would occur at all. A claimant certainly should be given an opportunity to make that choice and should not be forced to obtain medical care from the tortfeasor who necessitated the medical care. This is the conclusion reached by several lower federal courts which have considered the issue. *Feeley v. United States*, 337 F.2d 924, 934-35 (3rd Cir. 1964); *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078, 1084 (2nd Cir. 1988); *Powers v. United States*, 589 F.Supp. 1084, 1108 (D.Conn. 1984); *Christopher v. United States*, 237 F.Supp. 787, 798 (E.D.Pa. 1965).

An award of future medical expenses to a veteran who is entitled to receive free medical care is not "punitive" merely because there is a possibility that the veteran will seek the free care and thus obtain a duplicate recovery from the damage award. The claimant veteran should be given the right to choose between private facilities and Veterans' Administration facilities, and should not be

forced to choose the Veterans' Administration facilities. If the right is exercised and private facilities are chosen, there will be no double recovery.

b. The possibility of a double recovery is a matter for Congress, not the courts.

Although there is a possibility that a veteran will choose to seek medical care at Veterans' Administration facilities and that an award for future medical expenses will thereby result in a double recovery, the possibility of a double recovery is permitted by the legislative scheme, as it presently exists. If this possibility is to be eliminated, it is a matter for Congress, not the courts.

Title 38, U.S.C. §610 provides that a veteran with a service-connected disability is entitled to receive free medical care from the Veterans' Administration. The statute does not provide for a denial of care or for an off-set of the cost of the care in the event that the veteran brings a successful claim against the Government under the Federal Tort Claims Act.

Both *Feeley* and *Ulrich* specifically point out the fact that an award of future medical expenses may result in a double recovery, but they note that such a double recovery is allowed under the legislative scheme, unless Congress acts to amend the law. In *Feeley v. United States*, 337 F.2d at 935, the court stated that the mere fact that the plaintiff may decide to seek future care from the Veterans' Administration "should not be a consideration in awarding damages under the Federal Tort Claims Act, but rather is a policy judgment to be made in the administration of veterans' benefits." Similarly, in *Ulrich v. Veterans Administration Hospital*, 853 F.2d at 1078, the court stated:

[T]he district court's failure to award future medical expenses was erroneous if and to the

extent it relied on the premise that the VA will provide plaintiff free care in the future. That this might result in a windfall for him is a matter for Congress, not the courts.

Title 38, U.S.C. §610 must be contrasted with 38 U.S.C. §351, which is a statute providing for veterans' disability benefits which specifically deals with the issue of the possible double compensation which could occur if the recipient of benefits brings a Federal Tort Claims action. Section 351 provides that if an individual either receives an award or enters into a settlement in an action under the Federal Tort Claims Act, then disability benefits are to be suspended "until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise." 38 U.S.C. §351. Thus, if a veteran is receiving disability benefits, and he brings a Tort Claims action against the Government and recovers damages for impairment of earning capacity, the disability benefits are suspended until an equivalent amount has been exhausted from the tort recovery.

Congress saw fit not to include a similar type of provision regarding the receipt of medical care from the Government if future medical expenses are awarded in an action under the Federal Tort Claims Act. This lack of and need for Congressional action was specifically noted in *Powers v. United States*, 589 F.Supp. at 1108-09, where the court stated:

The Court wishes to emphasize, however, that proper Congressional action, such as tying in the set-off provision of 38 U.S.C. §351, *infra*, to the medical treatment available to veterans under 38 U.S.C. §610 *et seq.* would eliminate not only the windfall conundrum which confronts and concerns federal courts under these, or similar circumstances, but also protect the federal

treasury from the threat of an unnecessary double payment for the same injury.

Title 38, U.S.C. §351 is indicative of the fact that Congress knows how to preclude the possibility of a double recovery for both veterans' benefits and damages in a Federal Tort Claims action. Just as in 38 U.S.C. §351, where Congress set out a scheme to preclude the possibility of a double recovery in a Federal Tort Claims action if the veteran is receiving disability benefits, Congress could also have enacted a similar provision to avoid the potential for a double recovery in a Federal Tort Claims action if the veteran is entitled to receive free future medical care under 38 U.S.C. §610. Congress could have either provided for a suspension of the entitlement to free medical care until such time as the fund established pursuant to the award in the Federal Tort Claims action had been depleted, or, in the alternative, Congress could have provided that the Veterans' Administration would provide the care, but then charge the cost of the care back to the veteran. Such a provision would provide a workable approach to the issue which is present here, would preclude a double recovery for future medical care, and would preserve the claimant's right to choose the facility where he will receive care. However, even though the need for remedial legislation was pointed out by the *Feeley* court in 1964, the *Powers* court in 1984, and the *Ulrich* court in 1988, Congress has not enacted such a provision. In the absence of such a provision, the Seventh Circuit had no right to deny an award of future medical expenses to Mr. Molzof.

c. The remedy provided by the district court is not workable.

The district court determined in this case that the Government was required to bear the expense of Mr.

Molzof's future medical care. However, instead of providing Mr. Molzof with the type of remedy he requested, that is, an award of damages for future medical care, the district court ordered the Government to provide Mr. Molzof with the same level of care he had been receiving at the Veterans' Administration Hospital in Tomah, and to pay him a sum of money to cover the cost of certain additional care which he was not receiving at that hospital - physical therapy, respiratory therapy and doctor's visits. The district court, however, did not explain how such a remedy would be implemented. The remedy is, in fact, unworkable.

The district court directed the Government to provide Mr. Molzof with "reasonable, adequate and necessary" medical care, but failed to state what procedure could be utilized to ensure that Mr. Molzof received such care. In order to ensure that such care would be provided, someone presumably would have had to constantly monitor the care being provided at the Veterans' Administration Hospital. The district court's order failed to specify the remedy which would be available in the event the Veterans' Administration failed to provide "reasonable, adequate and necessary" medical care. For instance, the order did not state where Mrs. Molzof could have gone to enforce the order if she were unsatisfied with the care being provided by the Veterans' Administration or who would determine whether the care received by Mr. Molzof was "reasonable, adequate and necessary." Presumably, if Mrs. Molzof were unsatisfied, she would have had to have gone back to the district court and requested the court to order the Government to provide a better quality of care. She would have had to have done this each and every time that she was not satisfied with the care. In sum, the district court's directive to the Government to provide Mr. Molzof with "reasonable, adequate and necessary" medical care was unworkable.

The district court's directive to the Government to pay for additional aspects of care which Mr. Molzof needed but which were not being provided by the Veterans' Administration was also unworkable. The district court was recognizing the inadequacy of the care provided by the Veterans' Administration and was trying to supplement the care, but it did not provide any direction as to how Mr. Molzof, while hospitalized in a Veterans' Administration facility, was to obtain additional physical therapy, respiratory therapy and additional visits by a doctor. The court awarded Mr. Molzof money to pay for these services, but did not explain how Mrs. Molzof could possibly have brought private physical therapists, respiratory therapists and physicians not employed by the Government into a Government facility to provide care to Mr. Molzof. The court did not explain how physicians and other medical personnel not employed by the Government were to gain access to a Governmental institution.

The district court's attempt to avoid the prospect of a double recovery for future medical expenses was obviously unreasonable and unworkable. There is a workable solution to this problem, but it requires Congressional action which has not taken place.

B. The Question Of Whether Robert Molzof Was Entitled To Recover Damages For Loss Of Enjoyment Of Life Must Be Determined Under Wisconsin Law.

1. Wisconsin has recognized a claim for loss of enjoyment of life.

Wisconsin has long recognized a claim for loss of enjoyment of life. As early as *Benson v. Superior Mfg. Co.*, 147 Wis. 20, 132 N.W. 633 (1911), the Wisconsin Supreme Court recognized this claim. In that case, the court

reviewed the propriety of the trial court instructing the jury on the right to compensation for "deprivation of the pleasures of life." While the court found no error in the use of that terminology, it indicated its preference for the phrase "diminished capacity for enjoying life," indicating that although there was no substantial difference between the two phrases, the preferred one was less likely to be misunderstood. 147 Wis. at 30.

In *Bassett v. Milwaukee N.R. Co.*, 169 Wis. 152, 170 N.W. 944 (1919), the Wisconsin Supreme Court reviewed the propriety of the trial court instructing the jury that they should compensate the plaintiff for "the extent, if any, to which it [the injury] had affected his ability to engage in pastimes." The court stated:

Having conceded that damages because of "diminished capacity for enjoying life" is proper, we do not appreciate the force of the contention that in awarding damages the jury may not take into consideration "the extent, if any, to which it [the injury] had affected his ability to engage in pastimes." "Diminished capacity for enjoying life" is more comprehensive than "ability to engage in pastimes." Plainly the former includes the latter and more.

169 Wis. at 159.

This principle has been incorporated into the standard jury instructions used in civil cases in Wisconsin. In Wis. J.I. - Civil 1750, the jury is told that in determining what sum of money will fairly and reasonably compensate the plaintiff for personal injuries, the jury should "consider also to what extent his injuries have impaired and will impair his ability to enjoy the normal activities, pleasures, and benefits of life." This language can also be found in Wis. J.I. - Civil 1750A. Wisconsin obviously does not treat damages for loss of enjoyment of life as punitive damages, since the reference to loss of enjoyment of life is included in the instructions on compensatory damages.

The Wisconsin appellate courts have not directly addressed the issue of whether an injured plaintiff can recover for loss of enjoyment of life if he cannot consciously appreciate that loss. In *Benson and Bassett*, no limitation was placed on the right to recover for loss of enjoyment of life, and the petitioner submits that under Wisconsin law, a comatose plaintiff has a right to recover for such loss. The district court even noted that Wis. J.I. - Civil 1750 suggests that a claim for such loss is available in Wisconsin. (R. 75:186)

2. An award for loss of enjoyment of life is not precluded by the punitive damage proscription of 28 U.S.C. §2674.

The Seventh Circuit recognized in this case that although Wisconsin has permitted recovery of damages for diminished capacity for enjoying life, the Wisconsin courts have not addressed the question of whether a comatose plaintiff is entitled to recover damages for that loss. The Seventh Circuit held, however, that there was no need for the court to determine how a Wisconsin court would resolve that question, because it concluded that "even if Wisconsin courts recognized the claim for loss of enjoyment of life, in this case it would be barred as punitive under the Federal Tort Claims Act." 911 F.2d at 21.

Like its denial of an award of additional damages for future medical expenses, the Seventh Circuit's denial of an award for loss of enjoyment of life was based upon its definition of "punitive damages" as used in 28 U.S.C. §2674 as being those damages in excess of the amount necessary to compensate the claimant for his pecuniary loss. The Seventh Circuit reasoned that damages for loss of enjoyment of life would be punitive, because Mr. Molzof, being comatose, would not be able to benefit from the money and therefore not be compensated by it.

Since the Seventh Circuit's definition of "punitive damages" is not a valid one, its conclusion that an award of damages for loss of enjoyment of life to a comatose plaintiff is barred as "punitive" is also invalid.

The holding of the Seventh Circuit that an award of damages for loss of enjoyment of life to a comatose plaintiff is punitive in nature and thus not recoverable under the Tort Claims Act demonstrates how inequitable and how impractical the court's definition of "punitive damages" is.

It has been recognized that a claimant who has the ability to appreciate his loss can recover damages for loss of enjoyment of life in an action under the Tort Claims Act. See, e.g., *Burke v. United States*, 605 F.Supp. at 991-92; *Yosuf v. United States*, 642 F.Supp. 432, 439-40 (M.D.Pa. 1986); *Nemmers v. United States*, 681 F.Supp. 567, 573-77 (C.D.Ill. 1988), affirmed, 870 F.2d 426 (7th Cir. 1989); *Andrulonis v. United States*, 724 F.Supp. at 1524-25. For instance, in *Nemmers*, the plaintiff child suffered from severe mental retardation with an IQ of 45, cerebral palsy, an absence of speech capability, hyperactivity and eye problems. The court nevertheless held that an award for loss of enjoyment of life was appropriate, since he was mentally conscious and was capable of some measure of capacity to enjoy life.

An award for loss of enjoyment of life should not be considered compensatory when the plaintiff is consciously aware of his loss, and yet deemed "punitive" and nonrecoverable under the Tort Claims Act if the plaintiff is unaware of his loss. Yet, this is the effect of the Seventh Circuit's definition of "punitive damages." Application of that definition would result in creating a rule that the more severely brain-injured a claimant is and the greater his inability to comprehend his condition, the less he is able to recover. Such a rule would obviously

be inequitable. Application of the Seventh Circuit's definition of "punitive damages" would also be difficult and impractical. In order to determine whether an award of loss of enjoyment of life is compensatory and thus recoverable, or "punitive" and thus nonrecoverable, the federal courts would always have to scrutinize and measure the level of the claimant's awareness. The courts would have to establish a certain level of awareness which would act as a standard for the assessment of the claimant's right to recover damages. Any level of awareness above this standard would entitle the claimant to recover for loss of enjoyment of life, but any claimant with a level of awareness below that standard would not be able to recover such damages because they would be "punitive."

The Seventh Circuit's definition of "punitive damages" as being those damages in excess of the amount necessary to compensate the claimant simply cannot be adopted as a standard for determining what types of damages a claimant is entitled to recover under the Tort Claims Act. That definition should be rejected and instead, the Court should apply the traditional tort definition of "punitive damages." Since an award of damages for loss of enjoyment of life is not intended to punish the Government for the egregious nature of its employees' conduct, but instead is intended to compensate the claimant for his loss, such damages are not prohibited by 28 U.S.C. §2674. Rather, the question of whether a claimant is entitled to recover such damages is to be determined under state law. Accordingly, the question of whether Mr. Molzof was entitled to recover damages for loss of enjoyment of life is a matter to be determined under Wisconsin law.

CONCLUSION

The Seventh Circuit's conclusion that an award of damages for future medical expenses in an amount greater than

the amount awarded by the district court and damages for loss of enjoyment of life would be "punitive" and therefore barred by the proscription of "punitive damages" in 28 U.S.C. §2674 was erroneous.

Therefore, the petitioner respectfully requests the Court to reverse the judgment of the Seventh Circuit. The petitioner requests the Court to remand this case to the United States District Court for the Western District of Wisconsin for the entry of a judgment in the amount of \$1,331,649.03, which is the amount found by the district court as being the reasonable cost of medical care needed by Mr. Molzof over his three-year life expectancy, and for the entry of a judgment in the additional amount of \$60,000, which is the amount which the district court found would be an appropriate amount of damages for loss of enjoyment of life.

Respectfully submitted,

DANIEL A. ROTTIER

Counsel of Record

VIRGINIA M. ANTOINE

HABUSH, HABUSH & DAVIS, S.C.

217 South Hamilton Street

Suite 500

Madison, WI 53703

[608] 255-6663

THOMAS H. GEYER

KOPP, MCKICHAN, GEYER, CLARE

& SKEMP

44 East Main Street

Platteville, WI 53818

[608] 348-2615

Attorneys for Petitioner,

Shirley M. Molzof, as personal

representative of the Estate

of Robert E. Molzof

APPENDIX

28 U.S.C. §1346(b), United States as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674, Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been

available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

38 U.S.C. §351, Benefits for persons disabled by treatment or vocational rehabilitation

Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Veterans' Administration, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section

2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

38 U.S.C. §610, Eligibility for hospital, nursing home, and domiciliary care

(a)(1) The Administrator shall furnish hospital care, and may furnish nursing home care, which the Administrator determines is needed -

(A) to any veteran for a service-connected disability;

(B) to a veteran whose discharge or release from the active military, naval, or air service was for a disability incurred or aggravated in line of duty, for any disability;

(C) to a veteran who is in receipt of, or who, but for a suspension pursuant to section 351 of this title (or both such a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's continuing eligibility for such care is provided for in the judgment or settlement described in such section, for any disability;

(D) to a veteran who has a service-connected disability rated at 50 percent or more, for any disability;

(E) to any other veteran who has a service-connected disability, for any disability;

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(F) to a veteran who is a former prisoner of war, for any disability;

(G) to a veteran exposed to a toxic substance or radiation, as provided in subsection (e) of this section;

(H) to a veteran of the Spanish-American War, the Mexican border period, or World War I, for any disability; and

(I) to a veteran for a non-service-connected disability, if the veteran is unable to defray the expenses of necessary care as determined under section 622(a)(1) of this title.

(2)(A) To the extent that resources and facilities are available, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to a veteran for a non-service-connected disability if the veteran has an income level described in section 622(a)(2) of this title.

(B) In the case of a veteran who is not described in paragraph (1) of this subsection or in subparagraph (A) of this paragraph, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to the veteran for a non-service-connected disability -

(i) to the extent that resources and facilities are otherwise available; and

(ii) subject to the provisions of subsection (f) of this section.

(3) In addition to furnishing hospital care and nursing home care described in paragraphs (1) and (2) of this subsection through Veterans' Administration facilities, the Administrator may furnish such hospital care in

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accordance with section 603 of this title and may furnish such nursing home care as authorized under section 620 of this title.

(b)(1) The Administrator may furnish to a veteran described in paragraph (2) of this subsection such domiciliary care as the Administrator determines is needed for the purpose of the furnishing of medical services to the veteran.

(2) This subsection applies in the case of the following veterans:

(A) Any veteran whose annual income (as determined under section 503 of this title) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 521(d) of this title.

(B) Any veteran who the Administrator determines has no adequate means of support.

(c) While any veteran is receiving hospital care or nursing home care in any Veterans' Administration facility, the Administrator may, within the limits of Veterans' Administration facilities, furnish medical services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the disability for which such veteran is hospitalized, if the veteran is willing, and the Administrator finds such services to be reasonably necessary to protect the health of such veteran. The Administrator may furnish dental services and treatment, and related dental appliances, under this subsection for a non-service-connected dental condition or disability of a veteran only (1) to the extent that the Administrator determines that the dental facilities of the

Veterans' Administration to be used to furnish such services, treatment, or appliances are not needed to furnish services, treatment, or appliances for dental conditions or disabilities described in section 612(b) of this title, or (2) if (A) such non-service-connected dental condition or disability is associated with or aggravating a disability for which such veteran is receiving hospital care, or (B) a compelling medical reason or a dental emergency requires furnishing dental services, treatment, or appliances (excluding the furnishing of such services, treatment, or appliances of a routine nature) to such veteran during the period of hospitalization under this section.

(d) In no case may nursing home care be furnished in a hospital not under the direct jurisdiction of the Administrator except as provided in section 620 of this title.

(e)(1)(A) Subject to paragraphs (2) and (3) of this subsection, a veteran -

(i) who served on active duty in the Republic of Vietnam during the Vietnam era, and

(ii) who the Administrator finds may have been exposed during such service to dioxin or was exposed during such service to a toxic substance found in a herbicide or defoliant used in connection with military purposes during such era, is eligible for hospital care and nursing home care under subsection (a)(1)(G)

of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(B) Subject to paragraphs (2) and (3) of this subsection, a veteran who the Administrator finds was exposed while serving on active duty to ionizing radiation from the detonation of a nuclear device in connection with such veteran's participation in the test of such a device or with the American occupation or Hiroshima and Nagasaki, Japan, during the period beginning on September 11, 1945, and ending on July 1, 1946, is eligible for hospital care and nursing home care under subsection (a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(2) Hospital and nursing home care may not be provided under subsection (a)(1)(G) of this section with respect to a disability that is found, in accordance with guidelines issued by the Chief Medical Director, to have resulted from a cause other than an exposure described in subparagraph (A) or (B) of paragraph (1) of this subsection.

(3) Hospital and nursing home care and medical services may not be provided under or by virtue of subsection (a)(1)(G) of this section after December 31, 1990.

(f)(1) The Administrator may not furnish hospital care or nursing home care under this section to a veteran who is eligible for such care by reason of subsection (a)(2)(B) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) of this subsection.

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(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to the lesser of -

(A) the cost of furnishing such care, as determined by the Administrator; and

(B) the amount determined under paragraph (3) of this subsection.

(3)(A) In the case of hospital care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is -

(i) the amount of the inpatient Medicare deductible, plus

(ii) one-half of such amount for each 90 days of care (or fraction thereof) after the first 90 days of such care during such 365-day period.

(B) In the case of nursing home care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is the amount of the inpatient Medicare deductible for each 90 days of such care (or fraction thereof) during such 365-day period.

(C)(i) Except as provided in clause (ii) of this subparagraph, in the case of a veteran who is admitted for nursing home care under this section after being furnished, during the preceding 365-day period, hospital care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of hospital care in connection with such payment, the veteran shall not

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incur any liability under paragraph (2) of this subsection with respect to such nursing home care until -

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(ii) In the case of veteran who is admitted for nursing home care under this section after being furnished, during any 365-day period, hospital care for which the veteran has paid an amount under subparagraph (A)(ii) of this paragraph and who has not been furnished 90 days of hospital care in connection with such payment, the amount of the liability of the veteran under paragraph (2) of this subsection with respect to the number of days of such nursing home care which, when added to the number of days of such hospital care, is 90 or less, is the difference between the inpatient Medicare deductible and the amount paid under such subparagraph until -

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(D) In the case of a veteran who is admitted for hospital care under this section after having been furnished, during the preceding 365-day period, nursing home care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of nursing home care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such hospital care until -

(i) the veteran has been furnished, beginning with the first day of such nursing home care furnished in connection with such payment, a total of 90 days of nursing home care and hospital care; or

(ii) the end of the 365-day period applicable to the nursing home care for which payment was made,

whichever occurs first.

(E) A veteran may not be required to make a payment under this subsection for hospital care or nursing home care furnished under this section during any 90-day period in which the veteran is furnished medical services under section 612(f) of this title to the extent that such payment would cause the total amount paid by the veteran under this subsection for hospital care and nursing home care furnished during that period and under section 612(f)(4) of this title for medical services furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such period.

(F) A veteran may not be required to make a payment under this subsection or section 612(f) of this title

for any days of care in excess of 360 days of care during any 365-calendar-day period.

(4) Amounts collected or received on behalf of the United States under this subsection shall be deposited in the Treasury as miscellaneous receipts.

(5) For the purposes of this subsection, the term "inpatient Medicare deductible" means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b)) on the first day of the 365-day period applicable under paragraph (3) of this subsection.

(g) Nothing in this section requires the Administrator to furnish care to a veteran to whom another agency of Federal, State, or local government has a duty under law to provide care in an institution of such government.
